

COMMENT ON STATEMENT OF REASONS FOR ALLOWABLE SUBJECT MATTER

The reason stated on page 3 of the office action for claims 1-51 and 96-100 does not apply to claim 24.

REMARKS

The undersigned attorney appreciates the clarification of the rejection in a telephone call on November 7, 2006 with the examiner.

Claims 1-104 are pending in the present application.

The Examiner in the outstanding Action has allowed claims 1-15 and 96-100, for which the undersigned is appreciative. These claims remain unchanged.

Claims 52-95 and 101-104 are presently rejected.

Claim Rejections under 35 USC 101

Claims 52-95 and 101-104 are rejected under 35 USC 101 because the claimed invention is directed to non-statutory subject matter. Under the "Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility," only subject matter that is in one of the following categories are non-statutory: abstract ideas, laws of nature and natural phenomenon. It is submitted that the rejected claims do not fall in anyone of these categories and therefore are statutory. The fact that these claims include an "analyzing output" element does not convert an otherwise statutory claim into a non-statutory one. The courts have clearly ruled that the inclusion of computer performed step or steps in an otherwise statutory method claim does not thereby render the claim non-statutory under 35 USC 101.

While we disagree with the rejection on the ground that these claims are believed to be statutory under 35 USC 101, we have amended the claims and cancelled certain claims to expedite the allowance of the application. We retain the right to re-submit the cancelled subject matter in a continuation application to be submitted in the future.

Claims 52, 72 and 73 have been amended so that the "output analyzing" is no longer a part of these claims. For this reason, the reasoning for their rejection as stated in the office action no longer applies to these claims, so that they are believed to be allowable. The only other claim containing the "analyzing output" element is claim 67. In this claim, however, the output of the detector is analyzed to determine at least one distance between two interfaces of the sample. This is a practical application of the "analyzing output" element. This application constitute a tangible result of the element. Hence, it is believed that this claim is statutory under


35 USC 101, even assuming that the reasoning in the rejection as stated in the office action is valid.

CONCLUSION

In view of the amendments and remarks contained herein, it is believed that all pending claims (1-53, 55-64, 67-73, 75, 76 and 78-104) are in condition for allowance and an indication of their allowance is requested. However, if the Examiner is aware of any additional matters that should be discussed, a call to the undersigned attorney at: (415) 318-1162 would be appreciated.

FILED VIA EFS

Respectfully submitted,


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Date

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